

PERSPECTIVES



The Northern Territory Intervention and Human Rights An Anthropological Perspective

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Whitlam

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Foreword

The public release of the *Ampe Akelyernemane Meke Mekarle*, 'Little children are sacred', report on the sexual abuse of Aboriginal children in the Northern Territory on 15 June 2007 set in motion the train of events that have come to be known simply as The Northern Territory Intervention.

Who could help but be shocked and disturbed by the abuse, the years of neglect, and the personal and community destruction that report catalogues? A story, as Mary Edmunds reminds us, that others had told numerous times before. Who among us did not want something done at once; something dramatic and decisive; something that gave those kids protection and the rest of us some cause for hope?

Then came The Intervention.

The complexities that Rex Wild QC and Patricia Anderson described in their report became submerged by the overwhelming desire to act while, for a good few, the nature of The Intervention and its implications raised new questions.

I was struck on revisiting the report by a comment Wild and Anderson make very early on:

Are there simple fixes? Of course not! Our conservative estimate is that it will take at least 15 years (equivalent to an Aboriginal generation) to make some inroads into the crisis and then hopefully move on from there. Perhaps this is too optimistic...

The reality is that these are extremely fraught and complex issues in which the 'right path' is extremely difficult to discern.

I first read Dr Edmunds' paper as a draft prepared for the Human Rights Council of Australia. It is a very thoughtful, considered piece of work that peels back the layers: history, circumstance, culture, principles and practice. In doing so, it allows for the possibility of reconciling our human rights obligations and the imperative to act and does so conscious of Aboriginal people's 'contemporary lived experience'. It is one of those rarities: a passionate exposition, measured in its argument, that opens the space for engaging in the ideas rather than closing them down.

The Whitlam Institute is delighted to be publishing Mary Edmunds' *Perspectives* and is grateful to the Human Rights Council for so readily agreeing for us to do so.

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The Northern Territory Intervention and Human Rights: An Anthropological Perspective

Introduction

The identification of growing child sexual abuse in remote Aboriginal communities in the Northern Territory, linked in large part to substance, particularly alcohol, abuse, exploded into the Australian media in 2006 and 2007. The issues, including violence against Aboriginal women, were not new and had been sporadically, mostly sensationally, reported over time. But they were brought into shocking focus when Nanette Rogers, Crown Prosecutor for twelve years in Alice Springs, went public on the ABC's *Lateline* on 15 May 2006.

The catalyst that made this report effective in forcing national awareness of, rather than merely salacious attention to, the conditions of Aboriginal people in Central Australia, and in jolting the policy complacency of the Northern Territory Government, was the age of the children involved: one of the rapes was carried out on a two-year-old, another on a seven-month-old baby. Rogers' position and experience ensured that her information was sound; and indicated that these were not isolated cases but part of the routine conditions for women and children particularly, though not exclusively, in remote Aboriginal communities.

Of course, Rogers was criticised. Significantly, the criticism was not directed at her information but at the fact that she had spoken out. She had broken the code of discretion. She was by no means the first – earlier coverage will be set out below – but her interview shocked governments into action. Shortly after, the Federal Government convened the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities. A month later, on 26 June 2006, the Federal Government offered the States and Territories \$130 million over four years to address social problems in remote communities (Cripps 2007:6). As Cripps goes on to point out, 'this funding package was conditional on all references to customary law being removed from the Crimes Acts in each State and Territory'. This was an early hint of the broader measures that the then Howard government would be prepared to take.

The Northern Territory government also responded, although a little later. In August, it set up a Board of Inquiry to research and report on allegations of sexual abuse of Aboriginal children and to find better ways to protect them. The members of the Board were Rex Wild QC, a former Northern Territory Director of Public Prosecutions, and Patricia Anderson, an Alyawarr woman with many years of experience working with Aboriginal people, particularly in health. Their report, *Ampe Akelyernemane Meke Mekarle, 'Little children are sacred'*, was submitted to Clare Martin, the Northern Territory

Chief Minister, on 30 April 2007. It was released publicly on 15 June 2007.

The report's first recommendation stated: that Aboriginal child sexual abuse in the Northern Territory be designated as an issue of *urgent national significance* by both the Australian and Northern Territory Governments (2007: 7, 22. Emphasis mine).

The recommendation also stated: It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.

Within a week of the report's release, the Federal Minister for Families, Community Services and Indigenous Affairs, Mal Brough, had acted on the first part of the recommendation. On 21 June 2007, he announced a series of measures to be introduced in Aboriginal communities across the Northern Territory. The measures constituted what the Minister called 'a reform package' and went well beyond the recommendations of the *Little children are sacred* report.

As set out in the Minister's media release, and then effected in legislation, the measures included:

- alcohol restrictions on Northern Territory Aboriginal land;
- welfare reforms. In the *Social Security and Other Legislation amendment (Welfare Payment Reform) Act* this was specified as the income management regime, and the termination of the Community Development Employment Projects (CDEP) program and its replacement by 'other employment services';
- enforcing school attendance by linking income support and family assistance payments to school attendance;
- compulsory health checks for all Aboriginal children;
- compulsory acquisition of five-year leases over towns on Aboriginal land – subsequently referred to as *prescribed communities* – with the underlying tenure to be preserved and compensation to be paid;¹
- provision for the Commonwealth to override the powers of the Northern Territory government to forfeit

¹ Schedules to the *Northern Territory National Emergency Response Act* set out the affected towns: 47 on land held under the *Aboriginal Land Rights Act 1976*, 15 Community Living Areas (excisions granted on pastoral leases under the *Pastoral Land Act 1992*, and two on other tenures. When the Act was passed, 26 communities were immediately affected, the remainder within six months. The Groote Eylandt townships of Angurugu, Umbakumba and Milyakburra were excluded from the five-year lease provisions on the basis of an in-principle agreement with the Anindilyakwa Land Council to enter into 99-year leases. The agreement was signed on 7 August 2007, the day that the Intervention legislation was introduced into the parliament (Minister's Media Release 7 August 2007).

or resume the town camp leases around Darwin, Katherine, and Alice Springs² (also included in the term, *prescribed communities*) during the five-year period of the emergency response, with the option of acquiring freehold tenure;

- suspending the operation of the *Native Title Act* in the prescribed areas in relation to future acts, thus removing the right of native title groups to any say, including the right to negotiate, in proposed developments on this land;
- increasing police levels in prescribed communities;
- use of local workforces through work-for-the-dole to clean up and repair communities;
- banning the possession of X-rated pornography and introducing audits of all publicly funded computers to identify illegal material;
- scrapping the permit system for common areas, road corridors, and airstrips for prescribed communities on Aboriginal land;
- appointing managers of all government business in prescribed communities;
- introducing a licensing scheme for community stores;
- prohibiting the consideration of any form of customary law or cultural practice for bail or sentencing.

Not mentioned in the Minister's media release, but enacted in the legislation under the heading of 'Miscellaneous', were two key, and internally contradictory, provisions to prevent any challenges to the Intervention measures under the *Racial Discrimination Act (RDA)*. Their casuistry reflects the government's determination to prevent domestic challenge to the courts against the legislation and makes it almost impenetrable to non-lawyers. The first of the provisions, for example, is that anything done under the *Northern Territory National Emergency Response Act* is a 'special measure' under the *RDA*. The second is the suspension of Part II of the *RDA*: the 'Prohibition of racial discrimination'. In the *RDA*, the special measures clause falls under Part II. Suspension of Part II therefore also suspended the special measures provisions, or at least that part of the provision in clause 8 of the *RDA* that excepts the application of Part II to special measures. Whatever the legal niceties, a key effect was to remove any possibility of a complaint being made to the Human Rights Commission or Federal Court for any racially discriminatory act authorised by the Intervention legislation.³ The implications of these provisions for human rights will be discussed in the following section.

The *Sturm und Drang*⁴ impact of the Intervention measures was apparent within days. The *NT News*, with even more of a flourish than usual, carried the headline:⁵

2 The Tennant Creek town camps are included in the schedule to the *Northern Territory National Emergency Response Act* but, as with Groote Eylandt, an agreement was signed on 7 August with the Julalikari Council to facilitate 99-year leases, thus excluding them from the provisions of the Act.

3 Pers. comm. from Nick Parmeter, Law Council of Australia, 15 July 2010.

4 *Storm and stress*: the strong expression of upset and emotions

5 Quoted in Smith 2007: 3.

Martial law – Howard mobilises cops, military as he declares 'national emergency' in NT communities.

The paper went on to report:

The Federal Government yesterday seized control of the Territory's Aboriginal communities in the most dramatic intervention in NT affairs since self-government. Canberra in effect declared martial law over the 44 percent of the Territory owned by Indigenous people.

In conjunction with the language of the 'national emergency', the image conjured up by the newspaper – and exploited in a number of other reports – was of tanks rolling into Aboriginal communities. The reality was not quite as dramatic, though the elements of drama were there. It was Norforce, the army's North West Mobile Force of whom around 60 percent are Aboriginal, that was brought in to provide vehicle, logistic, and liaison support to the teams that were set up to go into the prescribed communities. The teams consisted of Northern Territory and Australian Federal Police and government departmental representatives. They were deployed to the first community – Mutitjulu (near Uluru) – on 6 July. This was followed during the week beginning 9 July by five other communities in Central Australia: Imanpa, Haasts Bluff, Arlparra, Nyirripi, and Santa Teresa, and a seventh – Willowra – on 13 July (Mitchell 2007). Several other Top End communities followed swiftly. So an image of army personnel 'rolling' into Aboriginal communities within a few weeks of the announcement of the Intervention was not completely fanciful.

The Minister proclaimed that this whole suite of measures, the Federal Government's 'reform package', was a justified response to the *Little children are sacred* report. He claimed the credit for acting on the basis of the report's recommendation to address the issue of child sexual abuse as an issue of 'urgent national significance' and for acting swiftly to do so on a deplorable situation. This was despite the fact that the situation had been known about, and reported on, both officially and anecdotally, for years, including the previous decade of the Howard government.

Moreover, the measures announced on 21 June ignored the second part of the report's first recommendation for 'genuine consultation with Aboriginal people' as necessary for long-term change. Instead, the supporting legislation was drafted and enacted in record time. Despite the length and complexity of nearly 500 pages for five Bills,⁶ they were introduced and passed in the House of Representatives on 7 August 2007. The next day, the Senate authorised an inquiry by the Legal and

6 These Bills were enacted as follows: *Northern Territory National Emergency Response Act 2007*; *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007*; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*; *Appropriation (Northern Territory National Emergency Response) Act (No.1) 2007-2008*; *Appropriation (Northern Territory National Emergency Response) Act (No.2) 2007-2008*.

Constitutional Committee and gave it five days to report. The committee reported on 13 August. On 17 August, just ten days after being first introduced to the parliament, all five Bills were passed in the Senate, given Royal Assent, and enacted as legislation.

Human rights implications and concerns

The extraordinary reach and speed of the Intervention measures both electrified and outraged. It is not the purpose of this paper to examine the politics of the Intervention but its impact on Northern Territory Aboriginal people in the context of Australia's international human rights obligations. At one level, this is a fairly straightforward task and was undertaken very early by a number of commentators (for example, Pritchard 2007; Aboriginal and Torres Strait Islander Social Justice Commissioner 2007; Altman and Hinkson 2007). Pritchard's measured critique, delivered within a month of the enactment of the legislation, is representative of the general concerns:

In my opinion, a number of the key provisions may contravene the fundamental human rights of Aboriginal people in the Northern Territory, and offend Australia's international human rights obligations. Of particular concern, from a human rights perspective, is the lack of consultation with the communities concerned, and the haste with which the legislation was prepared, and enacted... The legislation contains elements which are neither necessary nor justifiable as measures to address undoubtedly extremely serious problems of child sexual abuse highlighted in the June 2007 report... *Little children are sacred*.

Interestingly, Pritchard identifies

the most discriminatory aspect of the Emergency Response legislation are the provisions which suggest a land reform agenda unrelated to the protection of children from those who abuse them (2007: para.6).⁷

She then specifies the five-year compulsory acquisition of Aboriginal townships and the weakening of the system for Aboriginal land permits as aspects of the land reform agenda 'unrelated to the protection of children from those who abuse them'.

⁷ In fact, the government's first actions on a land reform agenda did not relate to the Intervention. They were undertaken a year earlier with the passing of the *Aboriginal Land Rights (Northern Territory) Amendment Act* in August 2006. Amongst other changes, the Act set up the processes for negotiating 99-year headleases over townships on Aboriginal land (Dillon and Westbury 2007: 121).

This was not the situation as described by Nanette Rogers; a number of the cases that Rogers cited took place at outstations⁸ which, she said, 'are often highly dangerous places to be for women and children, because they are unable to escape any of the violence'. Despite the demonstrably ideological agenda of the Howard government's reform package, Rogers' comments – and other reports that will be set out below – suggest that the links between the various Intervention measures are not as arbitrary as might appear at first.

Some aspects of the legislation can be seen more clearly to impact on Australia's human rights obligations, in particular the suspension of the *RDA*. Pritchard refers (para.35) to

the almost cavalier approach taken by the 'Emergency Response' legislation to Australia's international obligations in relation to the prohibition of racial discrimination, and to the provisions of the *Racial Discrimination Act 1975* (Cth).

Human rights are a hard-won historical and international achievement. As recent decades have demonstrated, they also remain vulnerable, including in Australia. They are too precious to be suspended or diminished. At the same time it is important to note, as Catherine Branson (2010: 4), President of the Australian Human Rights Commission and Human Rights Commissioner does, that

Any discussion of human rights...will always require a balancing act. The practical application of human rights law is only rarely about absolutes. It is more often about balancing different rights with one another, with responsibilities and with competing public interests.⁹

Nevertheless, the Intervention legislation had other alternatives to suspending the *RDA* and still achieving its objectives. In 1993, for example, there was serious discussion of the need for a 'technical suspension' of the *RDA* in order to be able to validate previous tenure grants that might otherwise have been invalid as a result of the *Native Title Act*. The prospect was canvassed as an acceptable negotiating position even among some staunch upholders of human rights. To many others it was unacceptable and, after fierce debate, that was the view taken by the Federal Government. The challenge was then for the legal drafters to think the issue through creatively. They did so, adding even greater complexity to the Act but avoiding any suspension, technical or otherwise, of the *RDA*. Instead, the *Native Title Act* sets out clearly that it is to be read and construed subject to the provisions of

⁸ The term 'outstations' – also referred to as 'homelands' – covers different types of discrete remote settlements. They range in size but are largely small family-based living areas. They were included as prescribed areas under the Intervention legislation.

⁹ In her spoken presentation, the Human Rights Commissioner gave the right to life as an example of one of those human rights that are absolute.

the *RDA* (cl. 7). In the *Native Title Act*, 'special measures' becomes part of the solution, not part of the problem.

The *RDA*, however, was not the only Intervention measure criticised as contravening human rights. The Aboriginal and Torres Strait Social Justice Commissioner sets out a detailed examination of the Intervention measures in his 2007 *Social Justice Report* (chapter 3, part 3) and concludes that, taken as a whole, they do put Australia in breach of its international obligations.

The critique's analytical framework rests primarily on the indivisibility of human rights: while the Intervention measures conform to the requirements of the *International Convention on the Rights of the Child* and the *International Convention on the Elimination of all Forms of Discrimination against Women*,¹⁰ they infringe the human rights principles embodied in the *Convention on the Elimination of All Forms of Racial Discrimination* and of Australia's *RDA*.

At the same time, the *Social Justice Report* also points out that 'there was a broad willingness from across all areas of society to work with the government to make lasting change in Indigenous communities' (Aboriginal Social Justice Commissioner 2007: 19). It goes on to cite an open letter to the Minister for Indigenous Affairs signed by over 150 organisations from the Aboriginal and community sector. The letter was dated 26 June 2007, five days after the Intervention was announced. It was not uncritical of those aspects of the Intervention that they saw as going 'well beyond an "emergency response" '. Nevertheless, the letter also stated:

The safety and well-being of Indigenous children is paramount. We welcome your commitment to tackling violence and abuse in certain Indigenous communities...We are committed to working with the Government to ensure that in developing and introducing the proposed measures, support is provided to Indigenous communities' efforts to resolve these problems.

The major reservation expressed in the letter as quoted in the *Social Justice Report* was in relation to the failure to work with Aboriginal communities: 'Successfully tackling these problems requires sustainable solutions, which must be worked out with the communities, not prescribed from Canberra'. Central to the Social Justice Commissioner's critique too, as to that of almost all critics, was the failure to involve the affected Aboriginal people in any process of consultation or participation.

10 Ironically, they also conformed to the about-to-be-adopted *UN Declaration on the Rights of Indigenous Peoples*. Article 22(2) of the *Declaration* sets out: 'States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination'. Australia voted against the adoption of the *Declaration*. This only changed with the change of government in November 2007. In April 2009, the Australian Government gave formal support to the *Declaration*.

Consultation, informed consent, and participatory rights

Anaya, in his capacity as academic not as a UN Special Rapporteur, writes that 'It has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them' (2005: 7). In the literature on international rights, this issue of consultation sits within discussions about participatory rights as distinct from substantive rights. Article 19 of the *Universal Declaration of Human Rights* and article 19 of the *Convention on Civil and Political Rights* both provide for the right to seek, receive and impart information. However, the processes required for the implementation of these rights are not specified. Those are set out in subsequent documents such as the *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention)*,¹¹ that identify the 'three pillars' of public participation: access to information, public participation in decision-making, and access to justice (Ebbesson 2009, 2.2). There has also been an extensive literature devoted to the issue with respect to Indigenous peoples.¹²

Consultation and informed consent constitute participatory rather than substantive rights. Nevertheless, there is clear research and practical evidence – from the Northern Territory, from elsewhere in Australia, and internationally – that programs imposed from above rarely work.¹³ In the introduction to the recommendations in *Little children are sacred*, Anderson and Wild state, 'We have been conscious throughout our enquiries of the need for...consultation and for Aboriginal people to be involved' (2007: 21). They quote Fred Chaney, reflecting from his long experience with Indigenous matters:

'One of the things I think we should have learned by now is that you can't solve these things by centralised bureaucratic direction...You need locally based action, local resourcing, local control to really make changes...I am very much in favour of a model which I suppose builds local control in communities...Not central bureaucracies trying to run things in Aboriginal communities...Once you try and do it by remote control, through visiting ministers and visiting bureaucrats fly in, fly out – forget it.'

The principle is clear, the evidence for this approach compelling, the practical examples reassuring. Nevertheless, after more than four decades of relentless consultation; of land rights and Aboriginal heritage laws in

11 United Nations Economic Commission for Europe.

12 Articles 18, 19, and 23 in particular of the *Declaration on the Rights of Indigenous Peoples* set out participatory rights. As indicated, the *Declaration* had not been formally adopted at the time of the Intervention, and Australia did not become a party until April 2009.

13 Peterson (pers. comm.) points out that the Northern Territory Land Councils were 'imposed' in the sense that their establishment was a decision of the Federal Government.

the Northern Territory and in most States; of common law and statutory recognition of native title; of a burgeoning of Indigenous organisations, with extensive opportunity for Indigenous decision-making and control; of a multiplicity of programs at all levels of government to address Indigenous disadvantage: the health, education, and socio-economic outcomes for Indigenous people, especially though by no means exclusively in remote Australia, remain abysmal.

The ambivalences of consultation

We need to look for explanations for the failure of so much consultation and so much well-intentioned public policy in the light of the situation identified by Nanette Rogers and the *Little children are sacred* report, particularly since these reports are only the most recent of a whole series of reports from around the country that have looked at the questions of Indigenous family violence and child sexual abuse. Earlier public reports bravely raised the issue of violence against Aboriginal women (Bell and Nelson 1989; Atkinson 1990; Bolger 1991; Lloyd and Rogers 1993).¹⁴

Queensland's Aboriginal and Torres Strait Islander Women's Task Force on Violence published their report (the Robertson report) in 1999. They observed (1999: x):

While the violence being regularly committed in Indigenous Communities has become front-page news, it is not new. It has been acknowledged by Indigenous and non-Indigenous forums for many years. The people who could have made a difference have failed to intervene to stop innocent women and children from being bashed, raped, mutilated and murdered and exposed to forms of violence that have been allowed to escalate to a level that is now a national disgrace.

Indigenous women's groups...have been calling for assistance for more than a decade...At times, Government representatives appeared to regard violence as a normal aspect of Indigenous life, like the high rate of alcohol consumption. Interventions were dismissed as politically and culturally intrusive in the newly acquired autonomy of Indigenous Communities...Communities, pushed to the limit, are imploding under the strain.

They went on to make clear:

The time for preventive measures is long past. Both Indigenous and non-Indigenous people must work together to stop the carnage through proactive intervention.

¹⁴ Other reports included one commissioned by the Crime Prevention Branch of the Federal Attorney-General's Department (Memmott *et al.* 2001 *Violence in Indigenous Communities*).

The Robertson report acknowledged the impact of the history of colonisation and of previous Queensland government policies, including the removal of children to state institutions, on present community violence and dysfunction (1999: xi). The history of Indigenous children in Queensland institutions was set out in greater detail in the report of another inquiry published at the same time as the Robertson report. This was the Commission of Inquiry into Child Abuse in Queensland Institutions (Forde 1999); the situation of Indigenous children was examined in the broader context of all children, non-Indigenous and Indigenous, in institutions. The Forde report noted that 'for over 100 years indigenous families have suffered the devastation of losing their children to the State' and observed that this resulted from 'administrative default, as well as by deliberate decree' (1999: 58).

While the Robertson Report, like subsequent ones, identified the need for involvement of Indigenous communities and organisations, it also placed strong emphasis on the responsibility of government and, importantly, the need for a whole of government approach to both service delivery and across a whole range of areas – social and economic development, the management of alcohol and other drugs, education, health, housing, policing – intrinsically related to the question of reducing violence.

Other States also set up inquiries: the Western Australian Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities (the Gordon Report 2002) and, in South Australia, the Commission of Inquiry into Child Sexual Abuse on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands (the Mullighan Report 2008). Both found widespread incidence of child sexual abuse, and of a failure of government to act. They also identified the same multiplicity of linked conditions creating the context for this alarming increase.

Why, then, has what Sutton (2009) calls 'the liberal consensus' on Indigenous policy since the 1970s¹⁵ apparently failed so direfully? Within the complex array of possibilities, at least three principal strands towards an explanation can be identified. None is comprehensive or sufficient, but all, I suggest, play a role. These three areas of concern are structural government disengagement, the paradigm of Indigenous people as victims, and the encounter between Aboriginal traditional culture and modernity.

¹⁵ Sutton (2009: 19-20) uses the term to refer to Indigenous policy and a 'host of related, value-laden matters of public interest' and 'a matter of shared political emotion'. He suggests that the latter was 'one of the reasons the 1970s consensus outlived its usefulness: it was a bond that gradually became disengaged from reality'.

Three key areas impacting on the exercise of Indigenous rights

The issue of structural government disengagement

One explanatory strand relates to the issue identified in so many reports, that is, the failure of government to act. Dillon and Westbury (2007) suggest that there is 'a longstanding lack of coherent policy engagement by governments at all levels, underpinned by the absence of determination and political will to make a difference'. They describe this as 'the issue of *structural* government disengagement' (2007: 4, 5-6). They go on to say:

We observe over and over that in the Indigenous domain, governments have, particularly in remote regions, failed to create and maintain the institutional frameworks which establish the foundation of the Australian state, and which underpin citizenship rights and responsibilities, and often the operation of markets. These institutional deficits can relate to deficits in legislative arrangements, in enforcement of laws both criminal and civil, in capital investment, recurrent government programs, or the mere presence of government officials.

In many cases, the deficits are disguised by the existence of non-standard ('special Indigenous') arrangements which effectively deliver second class outcomes...Invariably, the sheer numbers and complexity of government policies, programs and organisational structures, supplemented by increasing use of outsourced arrangements, create environments which deliver 'universal' benefits variably and inconsistently, and in many parts of remote Australia, not at all.

The authors are not suggesting an absence of government involvement in the Indigenous domain; on the contrary, they describe the bewildering and shifting multiplicity of government programs and personnel and what they suggest is 'implementation incapacity' (2007: 64-65). They acknowledge that 'our focus on government disengagement is counter-intuitive, and potentially contentious' (2007: 6). What they conclude, however, is that remote Indigenous Australia constitutes a failed state:

For most of the last forty years, governments have assiduously maintained the appearance that they have been engaged with Indigenous communities, particularly in remote Australia. But they have systematically failed to maintain the sustained traction which would have made that engagement substantive (2007: 209).

At the same time, Dillon and Westbury's argument is that government policy and programs will only be legitimate and effective when the engagement is with Indigenous citizens and when it assists in allowing Indigenous citizens 'to engage with mainstream values on their own terms' (2007: 11).

It is these 'own terms' that raise even more challenging questions in relation to the Northern Territory Intervention and its implications for human rights. What are the 'own terms' of Aboriginal people as part of the contemporary Australian nation? I shall return to this question later.

The paradigm of Indigenous people as victims

A second explanatory strand – or, to use Sutton's term, a sustaining fiction (2009:7) – has been a misguided reluctance to go beyond the paradigm of Indigenous people as victims, the victims of colonisation and dispossession, with violence as a direct result. The courts have accepted this explanation in a number of legal cases. Perhaps the most notorious of these was the Queensland case of Alwyn Peter who stabbed to death his de facto wife, Deidre Gilbert, in Weipa in 1979. The case was the subject of a book, provocatively entitled *Black Death, White Hands* (1982), by criminologist Paul Wilson. Peter was originally charged with murder but instead pleaded guilty to manslaughter. The expert witnesses who were called by his defence lawyers laid much emphasis on Peter's environment of 'social disintegration' and this was taken into account by the judge in sentencing (Dillon 1983).¹⁶ Pearson comments (2004: 5):

The whole approach was to paint Alwyn Peter (who had murdered his girlfriend whilst drunk) as a victim of history, trauma, Mapoon removal, etc. etc. The symptom theory underpinned the whole view.

To suggest the need to shift this paradigm is not to deny the shattering effects on Indigenous people of colonisation and dispossession. The trauma is personal and inherited (Pearson 2009: 162) and transgenerational (Atkinson 2002).

But it denies any possibility of agency to Indigenous people and is not a total explanation. Indigenous people are not only victims in this situation but also agents, acting in ways that accord with their own understandings of the world (Edmunds 1990: 9). The active participation of Aboriginal people in negotiating the *Native Title Act* in 1993, on the

¹⁶ David Bradbury's film, *State of Shock* (1988), explored both the killing and the situation of Aboriginal people in what was then Weipa South (now Napranum). The honesty of the film in confronting the social conditions in the town offended many Aboriginal people. It was reported that an Aboriginal group in Newcastle walked out in protest. A strong public defender of the film, and of Bradbury's willingness to tell things as they were, was Marcia Langton.

basis of the rights recognised in the *Mabo* case,¹⁷ is just one example of this.

Noel Pearson has been one of the Aboriginal people at the forefront of challenging the victim paradigm. In 2000, he published a groundbreaking paper, 'Our right to take responsibility'.¹⁸ This was the paper that most clearly articulated Pearson's concept of 'passive welfare'. He began to set out ways to address 'the concrete social and economic circumstances of our passive welfare dependency' (2009: 163). He also recognised the realities of racism, and of racism as 'a terrible burden'. But he challenged Aboriginal people to see racism as 'an impediment but not a disability' (2009: 161). He goes on to say:

It is a misconception that the social problems suffered by our people in Cape York Peninsula today have been with us since our traditional society was ruptured by European colonisation. This is not the case at all. Anybody who knows the history of our communities knows that the kind of social problems that afflict our society today – and their severity and extent – were not always with us.

The abuse and neglect of children today does not resemble the situation in the Peninsula communities of the 1960s and earlier...Our society was once functional – not just back in the long distant pre-colonial past, but only a bit more than three decades ago (2009: 163-64).

Sutton (2001, 2009) makes the same points. Both writers are talking about Cape York Peninsula, but their analysis can be extended, especially to other parts of remote Australia. A common theme throughout is the impact of the destructive role of alcohol, a point made strongly about the Northern Territory in the report to the Royal Commission into Aboriginal Deaths in Custody, *Too much sorry business* (Langton *et al.* 1991: 282-83):

At the time of writing, there were ten cases of Aboriginal deaths in custody in the Northern Territory which were within the terms of reference of the Royal Commission...All were male. Alcohol was involved in the majority of cases.

The report goes on to look beyond the deaths in custody (1991: 285):

Those deaths are one category of the manifestations of problems with alcohol. Being in custody as such does not increase one's chances of dying. Indeed the available statistics clearly demonstrate that one has a far better chance of dying, particularly violently, outside the Northern Territory jail system than in it. On the outside...the chances of meeting a violent – almost exclusively

alcohol-related – end are higher. And, while no Aboriginal women have died in custody in the Northern Territory during the 1989-1990 period, more women have been killed in alcohol-related murders than there have been deaths in custody.

In the following two decades, it is clear that the situation, far from improving, has got much worse. Bob Durnan, a longtime community development worker in Central Australia, goes to the heart of the issue when he describes Alice Springs as 'the frontier zone's urban centre, where traditional Aboriginal desert social and cultural practice encounters the regional headquarters of modernity' (September 2, 2009); or, more graphically, 'where remnants of traditional lifestyles meet the full force of modernity's excesses' (August 13, 2009).

Aboriginal traditional culture and the encounter with modernity

This brings us to a third explanatory strand, that lies in an analysis of both traditional Aboriginal values and practices – traditional culture – and their encounter with modernity. Before proceeding with that analysis, it is important to examine the two central concepts: 'culture' and 'modernity'.

To look, first, at the protean notion of culture: the interlocking sets of contemporary practices, beliefs and world-views that guide day-to-day lived experience for Aboriginal people in their various circumstances across the country (Martin 1990).

Culture is also about creating, modifying, and reproducing meaning, those 'webs of significance that [man] himself has spun' (Geertz 1975: 5). Such 'webs of significance' may be more or less generalised in any particular society. Inherent in the notion of a 'traditional' or 'pre-modern' society is a comprehensive and stable set of meanings that infer the world as complete. These meanings include a customary order and moral framework that, in turn, reinforce practices. Culture is about framing those practices and giving meaning to them and to the particular order that prevails.

There are important regional variations of culture across Indigenous Australia, including different experiences of colonisation. Colonisation came much later in some places than others and for those groups who became involved in the pastoral industry, for example, there was less radical disruption of traditional practices nor, indeed, exposure to many facets of modernisation. Missions and reserves may have been more disruptive but, likewise, did not represent modernity. This was the situation until at least the 1960s and 1970s.

Despite these differences, however, there are crucial commonalities that persist and remain more evident in remote than in settled Australia. These have been the subject of a growing body of anthropological writing

¹⁷ *Mabo v Queensland [No.2]* (1992) 175 CLR 1.

¹⁸ Republished in 2009 as one of his selected writings in *Up from the Mission*. Melbourne, Black Inc.

reflecting on the relationships between modernity, culture, and rights. Peterson, for example, drawing on the work of other anthropologists Musharbash and Austin-Broos, refers to 'the values of intimacy, immediacy, mobility and egalitarianism that underwrite remote Aboriginal social life' (2010: 255). He adds:

A person's identity is not defined by a career with the demands of working the market, but as a kinsperson doing work for kin...At the heart of the commitment to kin is the deeply relational ontology that is central to people's sense of self, making them particularly dependent on being embedded in a network of dense sociality.

Some of the practices arising from this 'dense sociality' are demand sharing and, it is suggested, a related dependency,

in terms of a culturally established and validated capacity to demand and receive resources and services (symbolic and tangible) from others. [This] is a core principle through which Aboriginal agency is realised in the structuring of social relationships (Martin 2001: 6).

Dependency in this sense has nothing to do with a failure of responsibility. On the contrary, Merlan (2009: 6) quotes from the work of Fred Myers with the Pintupi:

Analysing the basis of Western Desert relations of authority, he argued that Western Desert Aborigines understood these, not as an assured capacity to tell others what to do, but as the requirement to 'look after' others who present themselves as kinds of dependents. The stereotypical relationship of this kind is that of the ritually senior male who 'looks after' the junior initiate. The senior's authority is established as one who can ask services, food and other things of the initiate – but on the basis that he nurture and look after him. Authority in these relationships – and others too – involves not a one-directional capacity to command obedience but long-term entanglement and recognition of mutual, but differentiated, dependency...One of the capacities of dependence, in this Aboriginal view, is to recognise crucial others, demand attention from them, and thus try to shape them as responsive interlocutors.

Elsewhere, this notion of dependency has been interpreted as exchange or debt (Edmunds 1990: 13).

Social relationships are not given or static, but constantly constituted through an ongoing interchange in which ownership generates debt which is then repaid, and in which performance creates a greater claim than position. Central to this whole process...is negotiation and renegotiation, carried out from within the set of people who are

most closely related and extending to those who make up the world of meaningful others. These others are the people who are linked 'in a web in which debt is derived from ownership where service rendered or accepted provides the coin for a system of exchange' (Sansom 1982: 130).

In what other anthropologists have described as the intercultural space (Hinkson and Smith 2005), these relations of dependence (debt) and reciprocity (exchange) can, and are, extended to others, including non-Aboriginal people; and, indeed, including government and government representatives.

Turning to a consideration of modernity,

'Being modern' means to be in a state of perpetual modernization: modernity is, so to speak, the time of 'new beginnings' and of forever new 'new beginnings', of dismantling old structures and building new ones from scratch (Bauman in Bauman and Tester 2001: 72).

The notion of modernity is one generated by and rooted in European history and in the Western imagination. Within its ambit comes a range of characteristics applicable to the individual and to society. These characteristics are clustered and experienced in diverse and incomplete ways. There are, nevertheless, certain key attributes that define modernity and, at the same time, make it not a final state but a process always of becoming. Time, as Bauman suggests, is one of these attributes, projecting the present as fractured in relation to the past, so that the past is no longer the primary source of either meaning or legitimacy. In this context, time has become a measure of constant change, with change – the striving for some future-oriented better – as an end in itself.

Symbiotically entwined with this modern experience of time are rationality and secularity. Human agency, not divine or preordained order, is at the centre of the human world, in the making both of history and of meaning; giving rise to 'that final core of uncertainty at the heart of things' (Frayn 2000: 94). Other attributes of modernity are related: scientific, literate, egalitarian, liberal democratic and constitutional, politically structured as the nation state, governed and protected by the rule of law; and now a cash (or credit card) and consumer economy, combined with an electronic information flow and new forms of technologically networked sociality.

And rights, in the sense in which we now understand them, are a product of modernity; though the meaning of rights has itself undergone development. In an historical irony, we may see this development as the result of modernity's encounter with the traditional: a shift over the three generations of rights as individual rights have been re-situated by the experience of non-Western developing countries; or, in the language that separates the developed and developing parts of the globe into the North and South, by the South (Englund 2004: 6-7). In this analysis,

the first generation of rights – civil and political rights – has its basis in the European Enlightenment and its focus firmly on the individual. The second generation of rights – economic, social, and cultural – revises the centring of the individual as individual to a focus on social identity.

The suggested third generation of rights may be seen as a response to what Charles Taylor (1994) has called the ‘politics of recognition’, and to what various minority groups have called ‘difference-blind’ human rights (Englund 2004: 7). The notion of ‘difference-blind’ human rights is problematic and allowed countries such as Singapore, Malaysia, and China to contest the universality of human rights in the late 1980s and early 1990s on the basis of the particularity of ‘Asian values’. They argued that rights are culturally specific and contrasted Western values with Asian values, Asian values requiring the precedence of community over the individual; the precedence of social and economic rights over civil and political rights; and rights as a matter of national sovereignty (Li 1996:1). This argument did not prevail and has been marginalised since the 1993 Vienna World Conference on Human Rights that reaffirmed the principles of universality and indivisibility.

Despite its potential hazards, however, the third generation of rights has extended the understanding of rights to encompass matters such as the environment, the right to development and, most recently, the UN *Declaration on the Rights of Indigenous Peoples*.

Anthropological approaches to human rights

For anthropologists, a particular interest is in understanding how the various declarations of human rights are translated into people’s everyday lived experience. From an anthropological perspective:

Human rights are a property of relationships and interconnections between social persons who exercise moral agency, rather than a consequence of the essential capacities of asocial individuals... Anthropologists portray human rights as embodied in social persons and embedded in social networks (Wilson and Mitchell 2003: 8).

Hastrup (2003: 17-18) has identified ‘an ever present tension in human rights thinking between transcendent and historically embedded values’ but sees this tension as creative:

The tension itself should be explored for the insight it provides about human life itself, likewise unfolding between a sense of shared knowledge and individual experiences. From our own discipline, anthropology, we know that the only way to make sense of cultural difference is to assume a shared humanity and a basic intelligibility. Instead of being trapped in the stale discussion

between universalism and relativism as logically opposed and mutually exclusive, we have moved on to seeing universality and relativity as mutually implicated. This also goes for human rights.

‘Rights’ are not new to Indigenous cultures. Indeed, traditionally they play an essential role: a matrix of rights produced by descent from within by a person’s place within the network of kinship affiliations. The form of descent varies widely across regions, but the principle is common to all: rights in country and ceremony are inherited and defined by kinship. These rights are essentially combined with responsibilities. In South-East Arnhem Land, for example, there are three named categories of responsibility for land and ceremony. These are generally translated as owner (*mingirringgi*), manager (*junggayi*), and a third category for which there is no single settled interpretation but is described variously as minder or mediator (*dalyin*). A person is ‘owner’ for father’s and father’s father’s country, ‘manager’ for mother’s and mother’s father’s country, and ‘minder’ or ‘mediator’ for mother’s mother’s country. The three categories are interlocked and have no separable meaning but meaning only in relation to each other. Each carries its own very specific rights and responsibilities that together constitute the whole.

In an unpublished article on attempting to translate particular Yolgnu (North East Arnhem Land) words that might be used in discussions of contemporary governance, linguist Morphy (2007: 2-3) discusses the word ‘honest’. This was a term that had been put forward in an ‘Indigenous Governance Improvement Program’ workshop as a desired quality in people in positions of responsibility. As Yolgnu participants grappled with the meaning in English, ‘it quickly became evident that there was no simple way to translate this word into Yolngu-matha’:

Two of [the Yolgnu translations] at least... describe characteristics of a group rather than of an individual – a free translation might be ‘of one feeling’ or ‘of one way of thinking’. So here ‘honesty’ is not being seen as a personal quality, but rather as a property of a group – something we might translate as consensus – produced by interactions between its members.

At the same time, the understanding of kinship is not essentialist but, as Sansom (1982) suggests, demonstrated in Aboriginal ways of ‘doing business’. Aboriginal business starts off from a notion of ownership, not of material goods but of other valued goods: knowledge, business, a relationship, a problem, a dispute, a ceremony (Edmunds 1990: 12). There is room for negotiation of roles within this system of relatedness and, as Myers makes clear, people ‘seek to sustain a degree of autonomy within the constraints demanded by relatedness to others’ (1986: 159, 161). There is

great tolerance for the sheer qualities of individuality. Conformity is not desired, only

consideration for others. People are not ostracized for temporary, erratic, or even violent outbursts'. 'That's his business,' Pintupi say to the peculiar behaviour their comrades exhibit from time to time.

As Brady (1987) has documented, and will be noted later, this cultural tolerance plays a central role in the ways in which people deal – or, more commonly, do not deal – with drinkers and petrol sniffers.

There is still a need for an analysis that situates these traditional Aboriginal understandings of rights in relation to the broader discourse of human rights. Nevertheless, I suggest that the debate over the *process* of the Intervention – exacerbated by the Federal Government's legislative suspension of the *Racial Discrimination Act* – has set up an unnecessary and counter-productive opposition between key objectives of the Intervention on the one hand and human rights on the other.

Peterson (2010: 249) posits 'two broad categories of Indigenous issues that pose problems for government and politicians: Indigenous rights issues and what can be called Indigenous social indicator issues' and sees a contentious tension between the two. Merlan (2009: 7) proposes a different tension, similar to that described by Hastrup, between human rights arguments and the need to take account of people in their particular social and historical contexts. Her conclusion takes us in a more elaborated direction than that of Hastrup:

I think we should see the intervention as affecting people whose situation, while susceptible to description in racial terms, is not adequately understood in such terms...The problem with opposing the intervention as discriminatory is that it accepts 'race' as the problem, rather than going the harder route of seeing race as a dimension which has played a role in the ongoing structuring and reproduction of vulnerability, marginalisation and dependency...Race does not, and never has, offered a full account of the burdens of marginalisation and dependency that these communities have come to face, nor of the social and cultural specificity with which they do so.

We return to the notion of social and cultural specificity or, to go back to Dillon and Westbury's earlier description, 'own terms'. These can be viewed from different perspectives. Germane to the present discussion are two main approaches: how Aboriginal values and practices have affected the situation that has given rise to the Intervention; and how Aboriginal values and practices may effect necessary changes. Deeply implicated in both approaches is the nature of the historical interaction between Aboriginal and non-Aboriginal societies and the role of government in this intercultural space.

The role of Aboriginal values and practices in the development of present dysfunction

Contrary to the view of Aboriginal societies as shattered by colonisation and dispossession, many distinctive traditional Aboriginal values and practices persist. This is true across the country, but particularly relevant in remote Australia. At the same time, this persistence of traditional values and practices takes place as part of the historical interaction between Aboriginal and non-Aboriginal societies, and in the face of modernisation, and has been changed by the interaction (Martin 2001: 7). Change and adaptation in Aboriginal societies of itself is not novel, despite the projection – in Aboriginal discourse itself – of Aboriginal culture as unchanging. The difference since colonisation is the extent and rapidity of change. Aboriginal people have been asked to accommodate a modernity that took centuries to develop in Europe.

Nevertheless, the literature identifies a range of persistent values and practices that continue to inform both Aboriginal social life and influence action in the intercultural space. A crucial question is the extent to which practices that were previously adaptive have become maladaptive (Merlan 2010: 131), manipulated, and distorted, and the role of alcohol in this. Martin (2001: 11) sees alcohol, in these situations, not as one aspect of the social problems under discussion, but as 'deeply... implicated in the production and reproduction' of these problems.

For the purposes of this paper, I address only a few examples here.

Child rearing and socialisation practices

Of particular relevance to the stated purpose of the Intervention are the processes of child rearing and child socialisation. Hamilton's pioneering work (1981) on child-rearing practices amongst the Anbarra of Arnhem Land describes almost absolute indulgence of small children, particularly in relation to food, the non-existence of demands by adults on children, the way in which children are made responsible for themselves and for each other in the peer group. Langton *et al.* (1991: 475) put it this way: 'The most fundamental feature of Aboriginal children's lives is that, from infancy through to late childhood, they are largely socialised by other children'. Boys and girls are also treated very differently from very early, with girls expected to respond to the demands of others, as women are expected to respond to those of men.

Harrison (1986) identifies the importance of children's early assertion of independence in relation to their access to food. On Melville Island, she found that noisy and demanding children were fed more often than quiet and

passive ones. The development of 'the cheeky kid' was regarded as highly desirable. The down side of this value was a higher level of morbidity and failure to thrive for quiet babies than for noisy ones.

These practices developed in small-scale hunter-gatherer societies, where the number of children was small and widely spaced. This is no longer the case. Work by John Taylor over years in Indigenous communities has shown consistently that the demographics of the Indigenous population are almost the reverse of the broader Australian population. The key difference is the very young age composition of the Indigenous population compared with the increasingly old age composition of the broader Australian population. There are now many children in remote communities and the child-bearing age of women is very young. This is combined with a high adult mortality rate (Taylor 2006: 7).

At the same time, there is little evidence of a change in child-rearing practices, apart from the greater responsibility often placed on grandmothers. What were effective child-rearing practices in pre-modern times have now become inadequate in providing functional socialisation for children and young people. The imbalance between young and old also has implications for the effective functioning of internal systems of social control and for familial support networks. Both areas are rendered even more problematic with a prevalence of alcohol, other drugs such as cannabis (*ganja*), or petrol sniffing. Langton refers to this situation as 'the shock of the new' and concludes (2010: 112):

The new subjects are not the natives who comply too little or comply sufficiently for the various helpers and anthropologised professionals. They are, rather, very sick, vulnerable children with an uncertain future.

Displaced autonomy

Brady's work on substance abuse demonstrates over and over again the impact on drinking behaviour of the value placed on personal autonomy. In her early work at Yalata in South Australia, she found this tolerance to be fundamental in shaping people's attitude to drinking and drinkers (Brady 1987: 12):

Despite the oft-quoted assumption that Aboriginal life is marked by communalism and commensality, individuals may act autonomously and without the interference of others. Drinking, like many other activities of everyday life, is someone's 'own business', even if that business may adversely affect that individual and others: the 'community'.

The practical effect of this attitude was that people might growl them, but would often move their own sleeping arrangements in response to the disruptive behaviour of drinkers, even if this occurred in the middle of the night

(Brady 1987). This exploitation of autonomy extends to petrol sniffers (Brady 1992: 74):

Drinkers of alcohol and sniffers of petrol (both groups predominantly male) are able to transform the notion of personal autonomy, and the emphasis on generosity and indulgence, to their own ends.

In her work on the social epidemiology of petrol sniffing in Australia, Brady identified what she called 'one remarkable anomaly' in its regional distribution (1992: 183ff). This was the general absence of petrol sniffing in communities made up of people who had lived on cattle stations and worked in the cattle industry, or for whom the industry was a major component of their lives.¹⁹ She does not suggest a single reason for this but she does link it, to some extent at least, to the possibility that Aboriginal people on cattle stations were employed in an industry that gave them a great deal of freedom of movement, were exposed to European (though not necessarily modern) values, and were able, at the same time, to maintain responsibility for the continuance of traditional life. A point that older people often mention is also that they did work that gave them a feeling of self-respect, as well as earning the respect of others.

Dependency, debt, and demand sharing

Pearson (2009: 143ff) argues that it is passive welfare that has undermined Aboriginal law and he is savagely critical of the ways in which alcohol is distorting traditional values and relationships:

When you look at the culture of Aboriginal binge drinking you can see how passive welfare has corrupted Aboriginal values of responsibility and sharing, and changed them into exploitation and manipulation. The obligation to share has become the obligation to buy grog when your cheque arrives, and the obligation of the non-drinkers to surrender their money to the drinkers. Our traditional value of responsibility has become the responsibility of the non-drinkers to feed the drinkers and their children when the money is gone.

Martin (2001: 8) suggests that the issues are more complex than just the introduction of welfare payments, but agrees that its impact has been compelling. In his analysis, the fundamental role of access to cash has been 'to accentuate individuation, abstracting people from the particular matrices of responsibilities, rights, and other aspects of the sets of social relations which characterised Aboriginal societies'. In effect, he is describing a key impact of modernity: autonomy has become disconnected, instead of being grounded in social networks.

¹⁹ Brady does not articulate the same conclusion with respect to alcohol.

One important shift that has taken place over the last twenty years is that these matters can now be talked about publicly. At the time of the Royal Commission into Aboriginal Deaths in Custody (1987-1991), a paper by Gertrude Stotz was not released publicly.²⁰ The paper provided an analysis of the way in which men's initiation relationships in Central Australia were invoked by drinkers to ensure both ongoing supplies of grog and ongoing companionship for drinking.

Another important impact of this set of values relates to overcrowding in houses. This is not to suggest that housing in Aboriginal communities is adequate – it patently is not and is rightly a high priority for government policy – but the use of housing also reflects the social values associated with dependency, debt, and demand sharing. People find it very hard to refuse the demands of visitors, whether long or short-term, who call on the obligations of kinship, however tenuous. This is despite the fact that people used to have customary rights to their own camping spaces and some control over who could enter and when. Sutton (2009: 133) suggests that many Aboriginal people want more control over their households and who can live in them, and that moves to allow private ownership of houses 'can be understood not so much as a departure from communal Aboriginal tradition as a reincarnation of the traditional rights of householders'.

Consultation, informed consent, and the politics of representation

It is clear from what has been said earlier in this paper that the processes of consultation with Aboriginal groups by governments have, over many decades and despite declared good intentions, been woefully inadequate. Anecdotal evidence would suggest that, in general, they continue to be so. At least part of the dilemma, however, arises from what Hiatt (1986:4) referred to as the 'ordered anarchy' of traditional political authority. Authority is decentred with, as Sullivan (1997: 131) describes,

large land-holding groups as made up of alliances of smaller groups of various types with overlapping memberships, which are contextual rather than fixed in time and space and which exist for certain purposes at certain times.

Descent is the key determinant of membership of the land – and law – holding group, with age and gender as structuring, but not sufficient, principles of social organisation. In contemporary Australia, these smaller groups are often named as 'clans', or what Sutton (1998: 60) refers to as 'families of polity':

descent groups of enduring and central importance to the conduct of Aboriginal business. They are families of polity in the sense that they form major structural elements of public life in Aboriginal

society and do not belong merely to a domestic or private domain. They persist over long periods, and thus have many recognised deceased members who are not merely remembered but who continue to form powerful reference points in determining how their living descendants establish rights and interests in traditional forms of cultural property, including country.

A related network of such 'clans' or 'families of polity' constitutes the broader land and law holding group. Within this broader group – 'tribe', 'language group', 'traditional owners', 'native title group' – individuals and the smaller groups hold and exercise differential and multiple rights and responsibilities within an overall collective ownership. Authority is differentially based on these rights and responsibilities but is also earned by individuals, not automatically achieved. Further, the hierarchy in Aboriginal social organisation is age-related and contextual, located in ceremony and in knowledge and restrictions on its dissemination, and defines the right to speak for country and be involved in decision-making processes. Authority within this hierarchy is held by individuals but is not exercised individually. It has legitimacy and is exercised only in relation to relevant others in the group, relevance again being determined by each situation.

This fluidity of hierarchy and authority has meant that, from the time of colonisation, external authorities have been confounded by the questions: who is/are the right person/people for us to talk to? What is the system of authority and decision-making? How are decisions informed and made binding? The response of external authorities, most recently governments, has been to construct formal Indigenous entities – organisations, councils, the now disbanded Aboriginal and Torres Strait Islander Commission (ATSIC), traditional owner groups, native title claimant groups, native title prescribed bodies corporate – in an attempt to iron out the complexities of the answers to these questions.

The challenge, as Sullivan points out in relation to native title (1997: 134), 'is to reflect the finely balanced lines of authority that stretch throughout the whole society in modern institutions'. The burgeoning of Indigenous organisations since the passing of the Commonwealth's *Aboriginal Councils and Associations Act* in 1976; the appropriation of organisations by particular family groups to serve the interests of those families; the proliferation of disputes and fragmentation of broader groups in the Northern Territory land claim and in native title processes: these all highlight the difficulties that remain in matching the traditional exercises of political authority with the rational/legal institutions required in the modern world. They also highlight the problems associated with defining what is meant by consultation and informed consent and how and with whom such consent can be achieved.

To take just one recent example of these difficulties, the Kimberley Land Council (KLC) is a Native Title

²⁰ To my knowledge, this paper remains unpublished.

Representative Body with extensive experience in consulting affected communities in its region and in developing representative and consultative organisations structured to reflect both Aboriginal cultural forms and the needs of members (Sullivan 1997: 137). This has been a long and complex process but can now boast eight successful native title determinations covering almost 50 percent of the Kimberley, as well as a number of financially and socially significant agreements.

At the end of 2008, the WA State government announced James Price Point, some 53 km north of Broome, as the preferred location for a Liquid Natural Gas (LNG) precinct. The area is covered by the Goolarabooloo Jabirr Jabirr native title claim. Over a period of more than 18 months, the KLC carried out extensive consultations with both these and other affected groups. The process is described on the KLC web site (www.klc.org.au):

Summary of the Consultation and Decision-Making Process

The consultation process began in late 2007, with a meeting of Senior Cultural Bosses from across the whole Kimberley. This group insisted that Traditional Owners must be in a position to make informed decisions about activities on their lands. They designed the outline of a process for getting good information to people, and for giving people the opportunity to make their own decisions.

Throughout the consultation process, the KLC took instructions from Traditional Owners across the Kimberley. The Traditional Owners were organised in terms of their Native Title Claim Groups, as set out in the Native Title Act.

[In April 2009], the Traditional Owners voted with a significant majority to enter into a Heads of Agreement with the State and Woodside to move forward in the process of allowing an LNG facility at Prices Point. This agreement was conditional on environmental and cultural heritage requirements being met.

Within a year, after a very public campaign, the validity of this process and these decisions was challenged in the Federal Court by one of the Goolarabooloo native title group members.²¹ The result to date of this internal conflict has been prolonged delay in the signing of an Indigenous Land Use Agreement and the consequent announcement by the WA government, in September 2010, that it would not wait for the agreement to be finalised but would start a formal compulsory acquisition process.

The James Price Point saga is just one of many that demonstrate the dilemmas confronting the processes of consultation and the achievement of informed consent.

Whatever the final outcome, the Kimberley Land Council carried out its statutory responsibilities for consultation as a Native Title Representative Body, and also its responsibilities in the traditional processes of securing consensus among key traditional owners. What they were unable to take into account was a dissident view emerging outside those processes. This is a common situation and one that traditional law could once have dealt with. However, it fits uneasily into contemporary decision-making, raising a crucial question about how much, and whose, consent is needed for informed consent.

At the same time, James Price Point also suggests some of the ways in which Indigenous peoples are shaping their encounter with modernity by drawing on both traditional and modern forms of authority and decision-making. It is this kind of creative eclecticism, and an analysis that takes into account the experience of Aboriginal people on the ground, that allow us to move from the negative dimensions of ongoing traditional values and practices to examine how those values and practices can shape a productive engagement with the wider society.

The role of Aboriginal values and practices in effecting necessary change

Central to this possibility is the process that all the reports and commentators that I looked at earlier have recommended, that is, of Aboriginal participation in shaping their own future on their 'own terms'. This goes far beyond the notion of 'consultation' to having some actual control, either direct or indirect. The issues already canvassed in this paper make clear, together with the failure of so many key Aboriginal organisations and arrangements set up under the rubric of self-determination, that this is not an easy or straightforward objective. I would like to touch on just two examples of what is possible.

Developing dual accountability

It is axiomatic that the 'own terms' of Aboriginal people no longer exist in isolation from the rest of Australian society; can no longer, indeed, be seen outside 'an intercultural post-colonial frame, in which the Australian state has overarching sovereign power and jurisdiction' (Hunt and Smith 2008: 3). This is not to cast Aboriginal people back into a paradigm of powerlessness. On the contrary, Indigenous Australians have achieved significant moral and practical bargaining power on the basis of a range of rights, including but by no means confined to, land rights and native title rights. Nevertheless, this bargaining power is partial and erratic. The social indicators remain appalling. The everyday lived conditions for Aboriginal people, especially in remote areas and as canvassed in the various reports cited in this paper, too often include tragedy.

²¹ Roe v Kimberley Land Council Aboriginal Corporations [2010] FCA 809 (2 August 2010).

If Aboriginal people are to take back some control, they have to do so in the intercultural spaces of engagement with the broader Australian society. This means recasting systems of authority and social control and developing effective and appropriate decision-making and implementation processes. In short, taking back some control on their own terms involves imagining and establishing what has come to be known as good governance. Coming as it does from the field of international development, the concept of good governance implies a process of modernisation, but one that is able to take account of a variety of different models. The James Price Point process highlights some of the key problems in applying good governance processes for the purposes of consultation and achieving informed consent, but there are other more successful examples – including a number involving the Kimberley Land Council – that point to what is possible.

These issues were the subject of a five-year Indigenous Community Governance Project undertaken by the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University, in partnership with Reconciliation Australia, between 2004 and 2009. Dodson (2008: xvii) described its scope:

The Indigenous Governance Community Project has been ambitious. It aimed to elucidate the diverse conditions and models of contemporary Indigenous governance in different community and regional settings, with a focus on governing bodies and leaders, and the underlying cultural systems within which their governance is embedded.

The Project involved a multi-disciplinary research team and undertook eleven longitudinal case studies. One of their key findings was that, for any governance structure to work, it had to be accountable not just to external – for example, government – requirements but also, and essentially, internally to their own communities. Good governance structures have to achieve cultural legitimacy. The Project found that they do this through (Hunt and Smith 2007: xiv-xv):

- a) having representative structures and decision-making processes that reflect contemporary Indigenous views of what are the ‘proper’ relationships, forms of authority and cultural geographies; and
- b) ensuring that those are combined with a practical management and service capacity to deliver outcomes

This, of course, is more easily said than done, not least because, as the Project demonstrates, the context within which Aboriginal governance structures are developed is one of perpetually shifting government policy. An account of local government policy in the Northern Territory since self-government in 1978 would be not just a separate paper, but a book in itself. However, Smith (2007, 2008) sketches a three-year process for establishing what was to become, after yet another external interruption by a change in Northern Territory local government policy, the

West Central Arnhem Regional Authority. In conclusion, she sets out a number of conditions that must be met – and many of them were in this instance – for a governance structure to be effective and sustainable (Smith 2008: 107):

First and foremost, new governance institutions must be initiated by Indigenous people themselves on the basis of their informed consent. Second, the role of trusted and respected leaders is critical to institution building. Third, it must be undertaken in ways that resonate with community members’ views of what is considered to be culturally legitimate and practically workable. Fourth, external coercion and imposition of governance institutions have little traction in changing behaviour or building commitment and responsibility. And fifth, the facilitation and community development work of trusted government officers can make a major contribution to the implementation of enabling policies about governance.

The question, of course, arises about what happens in communities swamped by the ‘rivers of grog’ (Langton 2007: 14). It cannot be said that the Indigenous Community Governance Project did not encounter these issues, with case studies ranging from Wiluna in Western Australia, through a number of Northern Territory communities, to three homelands in Cape York. What that indicates, and is borne out by experience, is that there are different layers of daily experience in most remote communities and that dysfunction is not, in most instances, total nor terminal. This is not to belittle the extent of problems; merely to note that most Aboriginal communities are also places of resilience, of fellowship, and of good humour.

Invoking the authorising other

Brady’s work over many years on substance abuse by Aboriginal people has led her to this important concept, one that she continues to develop. She first articulated it these terms in 2000 as a result of research on brief interventions by doctors with individual Aboriginal drinkers (2004). What she found was that these kinds of brief interventions worked because they can give legitimacy to a change in behaviour and a decision to give away the grog. And these brief interventions are successful precisely because the doctors are not part of the kinship social network.

In the same way, one of the many reasons that Aboriginal people become Christians is also because it allows them to give away the grog. The opposition becomes that a person is a drinker or a Christian.

Police are also in the position of authorising other. Despite the often vexed relationships between Aboriginal people and the police, there has been a significant shift in these

relationships since the Royal Commission into Aboriginal Deaths in Custody. Even prior to the Commission, research by the Australian Law Reform Commission into the use of Aboriginal customary laws (1986) found that women in particular wanted police protection. In Tennant Creek, for example, where Julalikari Council had already set up a night patrol, Aboriginal women preferred to have the police deal with disputes and saw them as offering much more effective protection. In 2009, the North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Services commissioned a review of the policing component – ‘Taskforce Themis’²² – of the Intervention. The report comments, ‘It looks like the worst thing the police can do is nothing’ (Pilkington 2009: 5).

Sutton (2009: 137) elaborates the general principle:

Indigenous Australians frequently recognise that their own social and cultural resources are not enough to enable them to cope with the problems with which they are confronted in a post-colonial world.

It is part of the culturally legitimate Aboriginal repertoire, that is, to call on outsiders to intervene, or to accept intervention, when they do not have the social or cultural tools to solve what they themselves recognise as serious problems. At the same time, they do not expect such intervention to be unilateral. As Smith²³ observes, ‘Aborigines talk about being used to having a “hard law” of their own, and so are not averse to having whitefella “hard law” to get changes. But they want to be involved in how that hard law is applied.’

This brings us back full circle to the Northern Territory Intervention.

The Intervention

Despite widespread moral support for an urgent government response to address the issue of child sexual abuse, it is difficult to avoid the political and ideological context of the Northern Territory National Emergency Response. The history in Indigenous affairs of a decade of the Howard government – and indeed of Howard himself before he became Prime Minister – was of rejection of difference, of mainstreaming, and of ‘normalisation’. Altman (2007: 2)) summarises what he refers to as ‘reconstituting Indigenous affairs’ as a core ideological issue that was

primarily expressed through a litany of negatives: anti ATSIC (the Aboriginal and Torres Strait Islander Commission), anti native title, anti reconciliation, anti the rights agenda, anti apologizing to the Stolen Generation, anti land rights and anti the diverse intercultural institutions of Indigenous Australia.

Unfortunately, some of those institutions and the behaviour of their members, such as ATSIC and, in the latter days, many of the ATSIC Commissioners, made it all too easy for the government to act to abolish it.

Altman’s summary scopes the ‘why’ of the Intervention. Equally important was the ‘how’. It is very unlikely that the Intervention would have happened the way it did without Mal Brough as the relevant Minister. Two factors are particularly pertinent: Brough was new to Indigenous affairs²⁴ and had only been in his portfolio for six months; and he’d been a soldier. The *Little children are sacred* report provided him with the moral authority (Peterson 2010: 257) to cut through the bureaucratic and policy complexity and inertia. It allowed him to take the kind of ‘decisive, swift, coordinated action’ (‘t Hart 2007: 52) that are the hallmarks of a military campaign. By his own account,²⁵ three days after the announcement of the Intervention, one of his first acts was to contact Defence, ‘because they are the ones that will provide the logistical support for the police that will be coming out on the ground, or being deployed on the ground... the military will be paramount to be able to provide the communications and the logistic support such as vehicles’.

Cartoonist Nicholson summed it up with the Minister in army uniform declaring to a bemused Aboriginal man, ‘We’re replacing Rough Justice with Brough Justice’.²⁶

The language of ‘national emergency’ reflects the urgency of the *Little children are sacred* recommendations, though that report did not use the term ‘emergency’. But it also provided the government with a rhetoric to frame its response. ‘t Hart (2007) provides an analysis of the political use of this rhetoric and suggests that ‘emergency is a label, not a fact’:

The sense of threat, violation, uncertainty and urgency that terms such as emergency and crisis convey, shatters people’s understanding of the world around them...Moving an issue from ‘business as usual’ to the domain of ‘emergency’... opens up semantic and political space to radically redefine existing problems, propose new policies, foster public reflection, gain popularity and strike at opponents (2007: 52, 53).

22 This was the taskforce set up by the Northern Territory police as part of the Intervention. Themis is one of the goddesses of Greek mythology; in Homer, she was the personification of order and justice (*Australian Oxford Dictionary*). The taskforce has included police seconded from the Australian Federal Police and from some of the States. As well as Taskforce Themis, reports on the increase in police and police stations refer to Operation Themis and to Themis communities.

23 Personal communication.

24 Although a report in *The Bulletin* (10 July 2007, quoted in Gordon Moyes 15 November 2007, www.gordonmoyes.com) indicated that he has some Aboriginal ancestry, Brough has never called on that to justify himself.

25 ABC *Insiders* program, 24 June 2007.

26 *The Australian* 7 August 2007.

At the same time, there are risks in adopting an emergency approach,

Because they serve to release the constraining impact of procedural niceties, checks and balances, and existing path dependencies, episodes of emergency government often entail sweeping initiatives and big reforms – but also big mistakes... Boldness alone does not make for great leadership: most successful reformers make sure they have support from the key actors inside and outside government whose cooperation is essential to make things work on the ground (2007: 54, 55).

Some immediate impacts of the Intervention

It was clear at the time, and has been even clearer since, that big mistakes were made. Perhaps surprisingly, the use of the army to provide logistical support was probably not one of them. Norforce is a known and popular unit among Northern Territory Aboriginal communities. It is estimated that around 60 percent of its personnel are Indigenous, mostly part-time reservists. The Intervention was also not the first time that the army has been used to provide assistance to those communities. In 1996, a joint initiative was set up in response to a request to the Federal Government by members of Reconciliation Australia for better support for primary health care. The result was a partnership between ATSIC, the army, and the Department of Health and Family Services. The program was the ATSIC/Army Community Assistance Program and it remains in operation, using Army construction engineer units and civil contractors to provide health infrastructure and better environmental health conditions to Aboriginal communities. All projects are managed by the Army. Since its inception in 1996, the program has been carried out not just in the Northern Territory but also in South Australia, Western Australia, and Queensland.

In terms of what other parts of the Intervention will be judged to have been mistakes, this is fiercely contested ground. Even the question of using 'special measures' and the suspension of the *Racial Discrimination Act* has had its supporters among not just the rabid right but from people at the coal face. Vicki Gillick, coordinator of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council, for example, held the view that the practical benefits of the Intervention, including income management, were justified as special measures and were therefore not discriminatory (ABC *Lateline* 16/10/2008). This view was supported by other Northern Territory women, including many, though not all, Aboriginal women in Northern Territory communities.²⁷

Nor is there agreement about the effectiveness of the Intervention. In some instances, the immediate impact

was certainly experienced as a mistake. Smith (2007: 3) describes the reaction of the members of the West Arnhem Shire committee when, on the last day of their meeting, they heard without warning of the government announcement:

To say that the *Bininj* (Aboriginal) members of the West Arnhem Committee were shell-shocked would be an understatement. In one day, without any consultation, their collaboration with the Australian Government had essentially been made null and void. Their role as the proposed local government for the entire region was thrown into question, their work over the last three years ignored, and their governance roles treated with disdain... This group of Indigenous leaders have been working in partnership with both the NT and Australian governments for over three years. Their sense of betrayal was intense.

Brady (2007: 59) wrote:

Alcohol control is probably the *least controversial* issue to be dealt with by the government's Emergency Intervention in the Northern Territory. But have they found the right balance? Unhappily, I think not.

She goes on to explain her view (2007: 60):

A fair amount of grandstanding accompanied Minister Mal Brough's announcement of the bans on alcohol on Aboriginal land, as if to suggest that all were thoroughly soaked in grog, or that they allowed easy access to alcohol. This is a little strange considering that most Aboriginal land in the Territory was already dry. There were already 107 general restricted areas, all on Aboriginal land, and all in non urban areas (except for one town camp in Alice Springs). Only 15 of these 107 allow for liquor in any shape or form... Of the 'new' bans imposed by the Minister, the only genuinely new regulation is that which imposes an alcohol free status on the 'town camps'... Communities with permit systems have managed individual access to alcohol through Permit Assessment Committees, which have wide representation within the community, including police, school and council. Their decisions are grounded in the principle that access to alcohol is a privilege and not a right.

In summary, Brady indicates that 'the alcohol recommendations of the *Little children are sacred* report... are designed to work with and enhance the NT's existing legislative structure', and that the Intervention measures unhelpfully cut across them.

None of these measures protect against the sly grog trade, except possibly the increase in police numbers and the introduction of heavier penalties for offenders, both Aboriginal and non-Aboriginal.

²⁷ One of these women was Bess Nungarray Price, a Warlpiri woman from Yuendumu (ABC TV Big Ideas 2010).

A number of other measures received trenchant criticism: the compulsory acquisition of prescribed area and town camp leases; the introduction of compulsory income management for all welfare recipients in prescribed areas; the abolition of the Community Development Employment Program (CDEP); and the abolition of permits to common areas in prescribed communities. After the 2007 election of the Rudd government, the new Minister, Jenny Macklin, reinstated a modified CDEP and attempted to repeal the provisions of the Intervention legislation that weakened the permit system,²⁸ so I will not deal with those issues here.

The Intervention assessed

Now that the dust has settled, to some extent at least, it is possible to attempt a calmer assessment of the Intervention and its impact on the rights of the affected Aboriginal people. This was done officially in two reviews. One of these was carried out by the Northern Territory Emergency Response Taskforce, set up by Brough and chaired by Dr Sue Gordon. In addition, in June 2008, Macklin commissioned a further independent review of the Intervention. The Board was chaired by Peter Yu who was joined by two other members: Marcia Ella Duncan, the former head of the NSW Aboriginal child sexual assault taskforce, and Bill Gray, long-time policy adviser and bureaucrat in Aboriginal affairs and former head of the Australian Electoral Commission. They submitted their report in September 2008. Their assessment of the Intervention is set out in the Executive Summary and provides a crucial analysis of the impact of the Intervention. I quote key parts (2008: 9-11):

...Over 70 percent of Aboriginal people in the Northern Territory live within prescribed areas. NTER [Northern Territory Emergency Response] measures directly affect approximately 45,500 Aboriginal men, women and children.

In many communities there is a deep belief that the measures introduced by the Australian Government under the NTER were a collective imposition based on race...

Support for the positive potential of NTER measures has been dampened and delayed by the manner in which they were imposed. The Intervention diminished its own effectiveness through its failure to engage constructively with the Aboriginal people it was meant to help.

28 *The Families, Housing, Community Services and Indigenous Affairs Amendment (Emergency Response Consolidation) Bill 2008*. The Bill, among other things, was intended to repeal the provisions of the NTER legislation which weakened the permit system. However, the Bill has not been passed due to deadlock in the Senate over the proposed amendments (Law Council of Australia 2008).

Despite these very significant drawbacks the Review Board has observed definite gains as a result of the Intervention. It has heard widespread, if qualified, community support for many NTER measures.

The Review Report names particular measures that received general community support and were uncontroversial: increased police presence and police stations; measures designed to reduce alcohol-related violence, to increase the quality and availability of housing, to improve the health and wellbeing of communities, to advance early learning and education leading to productive and satisfying employment.

With respect to income management, the Report provided qualified support:

The benefits of income management are being increasingly experienced. Its compulsory, blanket imposition continues to be resisted, but the measure is capable of being reformed and improved.

People who do not wish to participate should be free to leave the scheme. It should be available on a voluntary basis and imposed only as a precise part of child protection measures or where specified by statute, subject to independent review. In both cases it should be supported by services to improve financial literacy.

Income management is in many respects representative of other NTER measures. If it is modified and improved, then the resistance to its original imposition might be negated.

Importantly, the Review Board concluded:

The situation in remote communities and town camps was – and remains – sufficiently acute to be described as a national emergency. The NTER should continue.

Bob Durnan wrote his assessment as someone with long involvement with Tangentyere Council in Alice Springs and still living close to its events in one of the prescribed areas (2008):

The changes that have occurred since the NT intervention have been nothing short of remarkable. It is as though a great logjam of problems has been released. Inertia and fatalism have diminished, violence and chaos are down, and there is a sense that real change is possible and happening. The alcohol, ganja and gambling problems still exist, but to a far lesser extent than previously, thanks to income management, improved policing, and other aspects of the intervention. Food is no longer much of an issue. Now, we rarely get people knocking on our doors

and saying 'I can't feed my kids tonight' or 'I need a power card, we've run out of electricity' whereas 12 months ago there was a lot of that.

Within the context of these assessments from a range of highly experienced and competent people, the negative findings of James Anaya, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, unfortunately read as quite formulaic.²⁹ Anaya's report (February, March 2010) was based on a ten-day visit to Australia, including visits to five Northern Territory communities and some town camps in Darwin and Alice Springs. He acknowledges the changes made to the Intervention under the Rudd government and that 'many of the program's components are undoubtedly legitimate and important efforts to address indigenous disadvantage' (Feb.2010: 10). He concedes that the presumption that the rights-impairing aspects of the Intervention measures 'might possibly be overcome only if there is a strong showing that the measures are proportional and necessary in regard to a valid objective, and that adequate consultations have been undertaken' (Feb.2010: 8). He concludes that the Intervention measures fail on both counts and that the Intervention 'as currently configured is racially discriminatory and incompatible with Australia's international human rights obligations under the Convention to Eliminate Discrimination and other international instruments' (Feb.2010: 17).

The Review Board Report also addressed the need to change these provisions of the Intervention (2008: 46):

From the Board's perspective, it is critical to ensure that the fundamental issues concerning the exclusion of the RDA [*Racial Discrimination Act*], the right to procedural fairness including the right to seek external merits review, the exclusion of anti-discrimination laws in the Northern Territory and the deeming of measures as 'special measures', are all matters that require immediate change.

The Federal Government's move to extend income control to other categories of welfare recipients in the Northern Territory (SMH 17/6/2010) will allow it to reinstate the *Racial Discrimination Act* and probably remove the 'special measures' provisions. However, the move does not reflect the recommendations of the Review Board Report (2008:23, 46) for changes to be made that would address these concerns. Their recommendations addressed the way in which income management could continue to apply to Aboriginal people on a non-discriminatory basis, not its extension to the wider community.

Whatever the merits or otherwise of the program's extension, it suggests that the full reintroduction of the *Racial Discrimination Act*, while essential, is not of itself

sufficient to protect the rights of Aboriginal people, especially of Aboriginal women and children.

In addition, Wilson and Mitchell (2003: 12), writing as anthropologists in the context of human rights in a global perspective, point to the importance of 'the ability of the state to generate legitimacy through providing stability, security and social services'. They also advocate the need for human rights institutions, whether UN bodies, state bodies, or non-governmental organisations, to 'provide greater access and accountability and openness to views of human rights based in the shared moral spaces of everyday life'.

The way forward remains complex and further mistakes will undoubtedly be made. At least the Federal Labor governments under Rudd and Gillard have taken some steps to respond to the imperative to re-engage with Aboriginal people and to develop policy and programs that will allow it to remove the discriminatory aspects of the Intervention and reinstate the *Racial Discrimination Act* in full.³⁰ It already has alternative models operating in Cape York (Aurukun, Coen, Hopevale, and Mossman Gorge) and Western Australia (some districts in metropolitan Perth and in the Kimberley) from which to draw. Both of these income management programs are voluntary. A further option is to offer welfare recipients 'access to income management capacity building programs, like the Family Income Management Scheme that has been operating for some years now' (Altman 2010: 3).

Nevertheless, as Merlan (2009: 2) observes: whatever else the Intervention did:

it established a boundary: a moment beyond which an earlier situation was declared intolerable, and a move was demanded towards something else.

The 'something else' has to be in partnership and, based on the short-term gains already made, demands the willing participation of Aboriginal people to be sustainable. In their chapter analysing the institutional determinants of government failure in Indigenous affairs, Dillon and Westbury (2007: 197), on the basis of their long and extensive policy experience, state unequivocally:

Policies and programs which ignore Indigenous perspectives and social constructs inevitably fail. This is a reality which policy makers ignore at their peril.

This will never be straightforward; there are few areas where Aboriginal people speak with one voice, and decision-making is itself a contested and negotiable arena as the James Price Point process makes clear. It can, nevertheless, be done; for example, the West Arnhem

²⁹ Anaya was, of course, reporting according to specific criteria set out in his brief as Special Rapporteur and was only required to address issues relating to Australia's international obligations.

³⁰ On 21 June 2010, exactly three years after the announcement of the Intervention, the parliament passed legislation to reinstate the *Racial Discrimination Act*. The reinstatement will be effective from 31 December 2010.

Shire committee developed processes over three years for culturally legitimate local government until truncated by the Intervention (Smith 2007). A more public example was the dispute and negotiations over the Alice Springs town camps.

Moves towards partnership

The Alice Springs town camps

As indicated earlier, the Howard government's attempts to change Aboriginal land rights and arrangements in the Northern Territory preceded the Intervention. Negotiations over town camps with Tangentyere Council in Alice Springs and Julalikari Council in Tennant Creek began before the announcement of the Intervention. A few weeks after the Intervention, Julalakari Council signed a Memorandum of Understanding agreeing to the then government's requirement for 99-year sub-leases to the Northern Territory Government. Talks with Tangentyere Council, however, had been suspended. They were resumed only after the change of government and the new federal Minister, Jenny Macklin, had reduced the 99-year lease requirement to 40 years.

Even then, the negotiations remained fraught and took nearly eighteen months to complete. Actions included a threat by Macklin for the Commonwealth to compulsorily acquire the land, and continuing campaigns by the Alice Springs-based Intervention Rollback Action Group and the Sydney-based Stop the Intervention Collective. Advertisements were placed in newspapers, like that in *The Australian* on 30 July 2009: '*Stop the Blackmail. Keep Aboriginal Housing in Aboriginal Hands*'. Ironically, this was the day the media reported that sixteen of the eighteen town camp associations had accepted the government's lease terms and Tangentyere had signed an agreement with the Commonwealth Government for 40-year leases. Part of the deal was the release of \$138 million for housing and infrastructure.

The announcement proved somewhat premature. On July 31, Barbara Shaw, a resident of Mt Nancy, one of the two outstanding camps, sought an injunction from the Federal Court to prevent the leases being activated. The court granted the injunction. It remained in place until 26 November, when the Federal Court dismissed the appeal and lifted the injunction, allowing government funding to be released.

The eighteenth camp, Ilpeye Ilpeye, took a very different route. The Ilpeye Ilpeye Housing Association did a deal directly with the Federal Government. Rather than entering a sub-lease arrangement, the Association agreed to change the underlying tenure of the camp from community lease to freehold held by the Commonwealth. Any underlying native title is to be preserved. The agreement was effective from 1 February 2010 and was supported by Lhere Artepe, the Corporation representing

the Alice Springs native title holders. Its basis was the support by the camp residents for the possibility of subdividing the land into individual housing blocks that allows for individual home ownership.

All these situations demanded tough negotiations and, in the case of the Mt Nancy camp on behalf of all the town camps, resort to the courts. In the end, though, it proved possible to achieve resolution, but only by maintaining the active engagement of the relevant Aboriginal organisations and local people.

Conclusion

There are other examples that provide a model for the way in which government must engage with local Aboriginal communities to achieve long-term objectives desired by both government and Aboriginal people. The Indigenous Community Governance Project has, on the basis of extensive case study research, set out the prerequisites for effective partnership between government and Aboriginal communities. The Regional Partnership between Groote Eylandt's Anindilyakwa Land Council, the Commonwealth, the Northern Territory Government, the East Arnhem Shire Council, and the Groote Eylandt Mining Company is another example of how the rhetoric of partnership can be translated – not without ongoing struggle – into effective implementation.

None of this comes easily. Anthropologists, amongst others, have provided scathing, and often heart-breaking, accounts of the stresses that increasingly burden Aboriginal people: Langton, Martin, Sutton, Smith to name but a few. The stresses are both internal and external. Aboriginal people in the Northern Territory and elsewhere are caught in the moment of first imagining and then acting out the ways in which their culture cannot just survive the onslaught of modernity but, within modernity's intercultural space, retain its own ongoing meaning and vibrancy.

Merlan's 'something else' that must follow the Intervention, Dillon and Westbury's 'own terms', all the reports cited in the paper, point to both the problems and the fundamental necessity to involve Aboriginal people in working out solutions. As Smith³¹ summarises the findings of the Indigenous Community Governance Project: there will be no human rights for Aboriginal people until they have some genuine decision-making power and the responsibilities that go with that; and have that happen with the facilitation and mentoring of governments, that is, not just 'hit and run' like the self-determination policy proved to be, but sustained, informed, and bureaucratically enabling rather than obstructing.

It is essential that the Commonwealth ensure that Australia's human rights international obligations are fulfilled. But it also needs to ensure that this process takes

³¹ Personal communication.

account of how those human rights are implemented and experienced on the ground. The Intervention shook the assumptions of how that might happen. It relied, in its original incarnation, on the shock impact of *The little children are sacred* report. And, as Toni Morrison said in her 1998 ABC interview with Jana Wendt (*Uncensored*, Australian Broadcasting Corporation), 'I insist on being shocked...To lose the capacity to be shocked is to lose our humanity'.

But the impact of the Intervention also demanded that we reflect on how the implementation of human rights goes beyond pronouncements, fundamental as they are, to an active engagement between government and those affected by government policy. The present Federal Government approach is attempting to do that. It remains to be seen whether it will or, like so many previous governments, will not succeed.

The key to a long-term response is not to be captured by a disconnected rhetoric of human rights, but to anchor that rhetoric in its translation through the prism of Aboriginal people's contemporary lived experience. That lived experience draws on traditional culture and values; acknowledges dysfunction; recognises that it is subject to the forces of modernity, including necessary engagement with government in the intercultural space; but demands the right to operate in full partnership. That, finally, will determine how Aboriginal people's human rights are exercised.

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